

United States
Circuit Court of Appeals

For the Ninth Circuit.

G. W. BRAINARD, as Trustee of the Estate of PACIFIC
CO-OPERATIVE LEAGUE STORES, a Corpora-
tion, Bankrupt,

Petitioner,

vs.

FLOYD J. IRWIN, J. H. GOSNEY, FRED O. LLOYD,
FRANK W. LESNET, BERTHA A. BURGESS,
EDWARD BURGESS, W. A. GARA, T. Mc-
KIERNON, CLARENCE S. KING and J. H.
PHILLIPS,

Respondents.

Transcript of Record

IN SUPPORT OF

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress, Ap-
proved July 1, 1898, to Revise, in Matter of Law, of
an Order of the United States District Court
for the Southern Division of the
Northern District of Cali-
fornia, Third Division.

Exhibit "A."

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,435.

In the Matter of PACIFIC CO-OPERATIVE
LEAGUE STORES, Bankrupt.

**Stipulation Re Testimony of R. H. Dobbs and Fred
O. Lloyd.**

It is hereby stipulated by the undersigned that the testimony of R. H. Dobbs and Fred O. Lloyd, hereto attached and made a part hereof, may be considered by the above Court as the evidence introduced by the respective parties hereto on the opposition of the trustee to the claims of Fred O. Lloyd, J. H. Gosney, Bertha A. Burgess, Edward Burgess, Clarence S. King, Floyd J. Irwin, W. A. Gara and Frank Leslet, against which written objections have been filed by the trustee.

It is also stipulated that upon said hearing the trustee waived all objections to the forms of said claims, and in particular waived any objection that might be based upon the fact that any of said claimants had not stated in his claim that he was entitled to priority, or had not designated himself, in his claim, as "clerk" or "salesman."

Dated: November 16th, 1922.

MARKS & COHEN,

Attorneys for Frank W. Lesnet.

JOSEPH KIRK and

CLARENCE A. SHUEY,

Attorneys for Trustee.

PERRY EVANS,

Attorney for J. H. Gosney, Bertha A. Burgess, Edward Burgess, Clarence S. King and Floyd J. Irwin. [1]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,435.

In the Matter of PACIFIC CO-OPERATIVE
LEAGUE STORES, Bankrupt.

Testimony of H. H. Dobbs.

H. H. DOBBS, being first duly sworn, testified as follows:

I was vice-president of the Pacific Co-operative League Stores, now bankrupt, from the date of its incorporation, and as such was familiar with and had charge of the employment of the managers for its various branches. The general duties of all of the store managers were to hire and dismiss employees, to purchase and pay for merchandise, to make certain reports daily, semi-monthly and monthly, depending on the character of the facts

to be reported, and to do all and everything that any clerk would do to successfully carry on the business of the branch. All of the acts of the managers were subject to the approval of the home office. The parent company kept the results of the business transacted by each branch separately.

The salaries of the managers averaged \$161.46 per month, depending on the volume of business of the branch and were specifically as follows, to wit: [2]

All the employees of the branch were absolutely subject to the orders of the branch manager, who employed his own men as he saw fit, fixing their salary and paying the same out of the receipts of the branch and accounting to the home office semi-monthly when he made a pay-roll report. [3]

The manager had full authority to make purchases for the branch, generally speaking. There were isolated cases where managers being advised that they could make certain purchases to greater advantage through the home office, placed an order through the home office, which was able to buy certain articles in large volume at a lesser cost. In such cases, when practical to do so, a branch was instructed to purchase through the home office.

The daily problems that came up in the branch were solved by the manager of the branch, he reporting, generally tri-weekly or monthly, as to what had been done in a general way. He had power to settle all details arising in the branch as any manager might do.

In the cases of the managers of Fresno, Calwa, Groveland and Tuolumne a greater portion of the merchandise was requisitioned through the home office owing to the fact that certain of the large wholesalers of San Francisco have a joint warehouse at Fresno from which merchandise could be delivered after purchased from the wholesaler in San Francisco. By purchasing through the home office it was able to obtain a better price from the wholesaler here on account of this fact than the branch could obtain independently. In this way particular branches were able to obtain the San Francisco price, which was cost of freight less than if the branch had purchased from other sources. No standard form was used by the branch as it was not a general practice of the league.

When Mr. Lloyd, the Fresno manager, was employed, he was told, as well as all other managers when employed, that their title was that of manager but they were given to understand that [4] because they were managers it did not mean that they were to stand around as floorwalkers, but were expected to do any and all work that would ordinarily be expected of a chief clerk, that is, they were expected to employ their full time at the branch and perform any work that became necessary for the success of the branch, employing such assistant clerical services as in their judgment was necessary to properly obtain the best results for the branch.

The managers had full charge to employ assistants. Occasionally the parent company would send

someone to the manager to fill a vacancy. If the manager felt that the man was suited for the position the manager employed him and fixed his salary and gave all orders of employment. The home office in no way limited the manager as to salaries except held the manager responsible for the results of the operation of the branch; that is, the home office held the managers to a certain percentage of overhead and the manager could adjust the salaries in such way as would bring the best results. The manager was required to keep the operating expenses of his branch in California at not to exceed eight per cent and at other places at not to exceed twelve per cent of the gross business done. The manager was not limited to amount of cash available for purchases but was permitted to buy to such extent as appeared reasonable or necessary for the business of the branch. If he over purchased and the home office was able, as it was in certain cases, to cancel the orders, such was done, and if not, warning was given to the manager that he should purchase less and if he did not do so would be subject to discharge.

The managers at Tucson, Orcutt, Maricopa and San Diego had cashiers who assisted the manager in his clerical work and in [5] certain cases in preparing reports which had to be verified and signed by the manager. So far as I know all of the managers used their best efforts to do everything that was necessary to make the branch successful by selling merchandise, arranging stock and such other work as is usually done in a store of a similar

character and size. The managers may have swept and dusted the stores if it appeared to them necessary and for the best interests of the branch that they do so. Every manager was working at the store in the same way that he would work if he was the owner of the store and desirous of realizing the best results from the business transacted by the store, being accountable to the home office for such results.

At Taft there was the manager and his wife and a delivery clerk. At Orcutt I believe there were four clerks assisting the manager; at Maricopa Mr. Gara had a cashier and by reason of this fact gave more time to meeting and waiting upon trade. He had practically exclusive power of management of the store subject to his reports being satisfactory. He had almost exclusive right to purchase whatever his needs might be to properly run the store at Maricopa. At Ferndale there was one assistant, at Rio Dell none, at Phoenix two, at Brae one, at Calwa none, except from time to time as necessary. At Carrizozo there was practically a one man store, that is, the manager did everything necessary to be done. There was no delivery and the volume was so small that the manager did not require any assistants. The power of all the managers was substantially the same. During the busy season a manager could employ more men, during the dull season less, and if the business did not warrant he was expected to transact all of the business himself, the object being that his branch should produce a profit. [6]

The usual amount paid to clerks was not to exceed \$110 nor less than \$80, the manager being left to decide what the proportionate amount should be that should be paid to clerks in order to keep the overhead at not to exceed eight or twelve per cent of the gross returns as before stated. One of Mr. King's assistants at the Orcutt store received a salary of \$125 or \$130. As a general practice Mr. King, at Orcutt, made out his own daily report in his own writing. In a few instances these reports were made out by the cashier but always signed by Mr. King. In Mr. King's absence his cashier would make up the report.

None of these managers were officers or members of the Board of Directors. San Diego had three stores under one manager, each store having a chief or senior clerk who was accountable to the manager. None of the clerks had any authority to buy, fix prices or to employ other help in the store.

Irwin and Mrs. Bertha Burgess were not managers; that was a temporary condition. Irwin was merely acting manager. I knew nothing about this arrangement until after his claim was filed. I presumed Mr. Frank Wagner was still manager there until this claim came in; he was manager until shortly before this bankruptcy proceeding and placed this man Irwin in charge without knowledge of the office.

The managers at Fresno and Calwa were under written contract of yearly employment under which they received a fixed salary which was to be in-

creased when the business and sales were raised so that eight per cent of the gross sales would exceed said fixed salaries. [7]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 12,435.

In the Matter of PACIFIC CO-OPERATIVE
LEAGUE STORES, Bankrupt.

Testimony of Fred O. Lloyd.

FRED O. LLOYD, age 31, residence Greenville, Fresno County, being first duly sworn, testified as follows:

I was employed by Mr. Rawitzer, assistant to the President. Mr. Dobbs and Mr. Ames stated to me that the business had been running more wide open than was proper and that the men employed would be held to a closer account; that while my position was that of a manager I was to understand that I came under the direct supervision of the home office and that the position which I was to hold was more of a chief clerk than manager; that I was to take charge of the store and do what local buying was necessary making daily reports to the home office; that I should anticipate my purchases a week ahead and make requisition on the home office on everything except perishable merchandise. Mr. Phillips was employed the same time and under the same instructions.

I opened the store in the mornings and swept out and dusted, having one man who did the delivery work for the store and who arrived there in the morning in time to assist in sweeping out and arranging the store for the business of the day. I waited upon customers. The other man was out delivering merchandise most of the time. I worked from eight until six, sometimes going back in the evening to make up my reports.

[Endorsed]: Filed Nov. 17, 1922, at 9 o'clock and 30 min. A. M. A. B. Kreft, Referee in Bankruptcy. [8]

Exhibit "B."

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,435.

In the Matter of PACIFIC CO-OPERATIVE LEAGUE STORES, Bankrupt.

Order of Referee Allowing Priority to Certain Claims.

The petition of the trustee herein for disallowance of the certain claims filed against the above estate, to wit:

Floyd J. Irwin.....	\$ 72.00
J. H. Gosney	627.44
F. Lloyd	100.00
Frank W. Lesnet	838.91
Bertha A. Burgess	75.00

Edward Burgess	75.00
W. A. Gara	162.50
T. McKiernon	16.25
Clarence S. King	700.00
J. H. Phillips	100.00

coming on regularly to be heard this 27th day of October, 1922, at 10 o'clock A. M. of said day and due notice of the hearing having been given as required by law, and C. A. Shuey appearing on behalf of the trustees and Perry Evans appearing as attorney for J. H. Gosney, Bertha A. Burgess, Edward Burgess, Clarence S. King and Floyd J. Irwin, and George Gordon appearing as attorney for W. A. Gara, and Marks & Cohen appearing as attorneys for Frank Leslet and W. E. Gearhart for F. Lloyd and the remaining claimants above named having failed to appear personally or through any representative, and testimony having been offered by the trustee and others present, and the matter having been submitted, now after due consideration; [9]

IT IS HEREBY ORDERED that all of the claims above enumerated be allowed the priority claimed up to the extent and not to exceed the sum of \$300.00;

IT IS FURTHER ORDERED that any sums remaining due in excess of the sum of \$300.00 be allowed as an ordinary claim entitled to participate in dividends paid herein.

Dated: October 27, 1922.

A. B. KREFT,
Referee.

[Endorsed]: Filed Nov. 15, 1922, at 2 o'clock and
— Min. P. M. A. B. Kreft, Referee in Bank-
ruptcy. [10]

Exhibit "C."

In the Southern Division of the United States
District Court, for the Northern District of
California, First Division.

IN BANKRUPTCY—No. 12,435.

In the Matter of PACIFIC CO-OPERATIVE
LEAGUE STORES, a Corporation, Bank-
rupt.

Referee's Certificate on Petition to Review.

To the Honorable MAURICE T. DOOLING, Judge
of the District Court of the United States for
the Northern District of California:

The undersigned, Referee in Bankruptcy, to whom
was referred the above-entitled matter, respectfully
certifies and reports:

That on the 27th day of October, 1922, an order
was made by the Referee herein allowing as labor
claims entitled to priority under Section 64-b of
the Bankruptcy Act the claims of Floyd J. Irwin
and others, set out in the order allowing the same,
filed on November 15th, 1922; that G. W. Brainard,
trustee of the above-named bankrupt, within time
granted by the Referee on November 16, 1922,
filed his petition to review said order.

The review concerns only such portion of the claims as represent labor earned within three months of the filing of the petition herein, not exceeding the sum of \$300.00 to any claimant. The trustee contends that these claims come within the ruling in the case of *Blessing vs. Blanchard et al.* (C. C. A. 9th Circuit, 35 A. B. R. 135), that the claimants are managers of branches of the bankrupt's business, and that such managers are not workmen, clerks and servants within the meaning of Section 64-b (4).

Upon the hearing C. A. Shuey, Esq., appeared as counsel for the trustee, Perry Evans, Esq., appeared for claimants [11] J. H. Gosney, Bertha A. Burgess, Edward Burgess, Clarence S. King, and Floyd J. Irwin; Messrs Marks & Cohen appeared as counsel for Frank W. Lesnet, and W. E. Gerhart, Esq., appeared as counsel for Fred O. Lloyd and J. H. Phillips.

The testimony taken upon the hearing has not been reported. A stipulation as to the evidence introduced has been signed and filed between the trustee and claimants represented by Perry Evans and Messrs. Marks & Cohen. W. E. Gerhart representing Lloyd and Phillips declined to sign a stipulation, and as to these claims the matter was submitted, leaving the Referee to state the facts. No matters were brought out affecting the credibility of witnesses. It is unnecessary for the Referee to make a summary of the testimony as the stipulation of the evidence is in itself a summary. I will hereinafter make a statement re-

specting the claims not included in the stipulation of evidence. There are certain facts concerning the character of the organization of the bankrupt and the business transacted by it which are not covered by the stipulation, and which in my opinion are material on this question of relation of employer and employee. In the year of 1913 there was formed under provisions of Section 653-b of the Civil Code of California a co-operative business association under the name of Pacific Co-operative League. The association consisted of seven members who were its directors, and a large number of associate members. The League established a chain of some thirty-seven grocery stores in the states of California, Oregon, Arizona, New Mexico and Nevada. The funds to establish such stores were obtained from its associate members who paid a membership fee of ten dollars and advanced as loan capital sums of money from fifty dollars upwards. [12]

The league had divisions referred to as educational division, fraternal division, and wholesale division, the latter being a purchasing division for the League. A sum exceeding two hundred and seventy-five thousand dollars was paid in by the associate members and denominated as loan capital. Persons experienced in the grocery business were employed under the designation of managers to take charge of and conduct said stores. Their compensation was at a stated monthly or weekly salary; the average salary paid such managers, as appears from the stipulation, was \$161.40 per month. In

some cases it was agreed that the salary would be increased where the same could be done under a basis of eight per cent on the gross sales. However, the business in no instance resulted in such increase. The League found itself restricted by reason of its form of organization in the obtaining of credit, and in the year 1921 a California corporation was organized under the name of Pacific Co-operative League Stores, the bankrupt herein. The original League had also been adjudged bankrupt and stands referred to the undersigned. The capital stock of the League Stores, corporation, was divided into 650,000 shares of common stock and 350,000 shares of preferred stock. Over 90 per cent of the associate members, numbering over 12,000, exchanged loan certificates in the League for shares of preferred stock in the League Stores, representing a par value of about \$275,000, so exchanged. The League had local boards, which acted upon educational and fraternal features of the organization; the League Stores had no local boards. The principal place of both the League Stores and the League was San Francisco. One E. O. F. Ames was appointed general manager of the League Stores Corporation. The League Stores Corporation issued eight per cent cumulative preferred stock, after the payment of which the common stock was entitled to receive six per cent; after such payment the surplus was to be divided equally between [13] the common and the preferred. As preferred stock was sold a like number of shares of common stock was issued, and placed in es-

crow with three trustees approved by the League, which trustees were also directors of the League, and directors of the League Stores; such stock being placed in escrow for the benefit of the League in order that the League might distribute the profits of the business to the purchasing members. By virtue of such common stock the League controlled the League Stores corporation. All stockholders of the League Stores, both common and preferred, became associate members of the League. Upon the formation of the League Stores Corporation there was transferred to it from the League the assets of some thirty-seven stores. The various managers of these stores continued to be managers after the transfer. It will be seen from the foregoing that the corporation, the League Stores, was but an instrument of the League instituted for convenience in the transaction of its business, and to better carry out its associate purpose.

For the benefit of Lloyd and Phillips, who have not signed the stipulation of evidence, I state the following:

The substance of the testimony of H. H. Dobbs, vice-president of the League Stores, is that a person given title of manager was placed in charge of a store with authority to conduct its business; if he needed assistance he was authorized to hire them, and discharge them; that he was to purchase whatever the store required in the way of merchandise or to requisition the same from the home office under certain circumstances; that as long as the manager made good he was not interfered with.

I quote the following from page 3 of the stipulation:

When Mr. Lloyd, the Fresno manager, was employed, he was told, as well as all other managers when employed, that their title was that of manager but they were given to understand that because they were managers it did not mean that they were to stand around as [14] floorwalkers, but were expected to do any and all work that would ordinarily be expected of a chief clerk, that is, they were expected to employ their full time at the branch and perform any work that became necessary for the success of the branch, employing such assistant clerical services as in their judgment was necessary to properly obtain the best results for the branch.

The quotation accords with my recollection with the addition that Mr. Dobbs explained that one of his reasons for telling them that while their title was manager, their duties were those of a chief clerk, was that he wanted them to understand that the home office did not consider itself bound by everything they might do. That the nature of the grocery business was such that it was of advantage for the managers to purchase certain classes of goods from the traveling or local representatives of wholesalers. That purchases should appear in the daily reports of the managers to the home office. If a manager in the opinion of the home office purchased too heavily his purchases were cut down. If the report was received too late to countermand

the order, the manager was cautioned or reprimanded, or even discharged. That the League Stores Corporation found it to advantage to buy in large quantities certain staples through the home office when in need of such goods the managers would requisition the home office. Mr. Lloyd testified in substance:

“I was employed by Mr. Rawitzer, assistant to the President, Mr. Dobbs and Mr. Ames stated to me that the business had been running more wide open than was proper and that the men employed would be held to a closer accounting; that while my position was that of a manager I was to understand that I came under the direct supervision of the home office and that the position which I was to hold was more of a chief clerk than manager; that I was to take charge of the store and do what local buying was necessary, making daily reports to the home office; that I should anticipate my purchases a week ahead and make requisition on the home office on everything except perishable merchandise. Mr. Phillips was employed the same time and under the same instructions. I opened the store in the mornings and swept out and dusted, [15] having one man who did the delivery work for the store and who arrived there in the morning in time to assist in sweeping out and arranging the store for the business of the day. I waited upon customers. The other man was out delivering merchandise most of the time. I worked from

eight until six, sometimes going back in the evening to make up my reports.”

As to the claims of Bertha Burgess and Floyd J. Irwin, I quote the following from the stipulation of Mr. Dobbs’ testimony:

“Irwin and Mrs. Bertha Burgess were not managers; that was a temporary condition. Irwin was merely acting manager. I knew nothing about this arrangement until after his claim was filed. I presume Mr. Frank Wagner was still manager there until this claim came in; he was manager until shortly before this bankruptcy proceeding and placed this man Irwin in charge without knowledge of the office.”

This statement it seems to me in itself overcomes the trustee’s objection. The trustee, however, has included these claims in the review.

As to the claim of Frank Lesnet, in charge of the store at Carrizozo, New Mexico, Mr. Dobbs testified as follows:

“At Carrizozo there was practically a one man store that is, the manager did everything necessary to be done. There was no delivery and the volume was so small that the manager did not require any assistant. The powers of all of the managers were substantially the same. During the busy season a manager could employ more men, during the dull seasons less, and if the business did not warrant he was expected to transact all of the

business himself, the object being that his branch should produce a profit.”

As to Phillips in charge at Calwa, California, the same statement applies. Mr. Phillips had no clerk except from time to time as necessary. Edward Burgess at Ferndale had one assistant. J. H. Gosney at Brae, California one assistant. Clarence S. King at Orcutt, Mr. Dobbs stated he believed, had four clerks assisting him. (See page five of stipulation.)

The salaries paid the claimants are as follows:
[16]

Fred O. Lloyd\$175.00 a month
J. H. Gosney 160.00 a month
Bertha A. Burgess 35.00 a week
Edward Burgess 35.00 a week
Clarence S. King 200.00 a month
W. A. Gara 200.00 a month
Frank Lesnet 160.00 a month
J. H. Phillips 160.00 a month

In my opinion the facts disclosed do not bring this case within the ruling of *Blessing vs. Blanchard*, *supra*. Blanchard was general manager of all of the business of the bankrupt on a salary of \$300.00 a month. Here the bankrupt's business consists of a chain of stores, under direction of a general manager who would correspond to Blanchard. The persons in charge of the stores it seems to me correspond more with the case of Winn, also in the Blanchard case, who was superintendent of the shop with authority to hire and dis-

charge his assistants, but who worked along with them, and who in that case was granted priority.

From the testimony I gather that the position of these claimants mainly called for hard work as clerks and salesmen, and a responsibility to make good, for which the salary paid was a very moderate compensation. At the bottom they are the servants of the 12,000 members of the League employed by their subsidiary in the carrying out of their associate enterprise. They are not the managers of that enterprise or of the League Stores Corporation. As persons in charge of the respective stores their authority is so far subordinated to the head office that the designation as "chief clerk" described their position more accurately than the title "manager," and according to the testimony of Mr. Dobbs they were treated as chief clerks in charge by the head office.

Dated: January 17, 1923.

Respectfully submitted,

A. B. KREFT.

Referee in Bankruptcy.

[Endorsed]: Filed Jan. 18, 1923, at 2 o'clock and 30 Min. P. M. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [17]

Exhibit "D."

At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 26th day of March, in the year of our Lord one thousand nine hundred and twenty-three—Present: The Honorable ROBERT S. BEAN, District Judge for the District of Oregon, designated to hold and holding this Court.

No. 12,435.

In the Matter of CO-OPERATIVE LEAGUE STORES, etc., in Bankruptcy.

Minutes of the Court—March 26, 1923—Order Affirming Certificate of Referee.

Pursuant to oral opinion this day rendered; it is ordered that the certificate of the Referee on Review as to certain claims, heretofore submitted, be and the same is hereby affirmed. [18]

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing eighteen pages contain full, true and correct copies of Stipulation relating to and testimony of R. H. Dobbs and Fred O. Lloyd (Exhibit "A").

Order of Referee allowing priority to certain claims (Exhibit "B").

Certificate of Referee on petition to review (Exhibit "C").

Minute order, affirming the certificate of Referee (Exhibit "D")

in the Matter of PACIFIC CO-OPERATIVE LEAGUE STORES, in Bankruptcy, No. 12,435, as the same now remain on file and of record in this office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 5th day of April, A. D. 1923.

[Seal]

WALTER B. MALING,

Clerk.

By C. M. Taylor,

Deputy Clerk.

[Endorsed]: Petition for Revision and Transcript of Record in Support Thereof. Filed April 4, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.